Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TINA KRAIL, ET ALS.,

Petitioners,

- against -

THE STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF OF PETITIONERS, KRAIL, CHADWICK, SMOLDORE AND HENDERSON, IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. THE NEW JERSEY COURTS, IN THIS CASE, RULED THAT THE PETITIONERS' ARRESTS AND CONVICTIONS WERE REQUIRED IN ORDER TO PRESERVE THE CONSTITUTIONALLY PROTECTED INTEREST OF A WOMAN IN AN ABORTION. WHETHER SUCH AN INTEREST IS PROTECTED UNDER THE FOURTEENTH AMENDMENT, THEREFORE, IS PERTINENT TO THE PETITIONER'S CONTENTIONS THAT THESE PROSECUTIONS ARE AN UNCONSTITUTIONAL APPLICATION OF THE CRIMINAL STATUTE. . . 1

A. INTRODUCTION 1

B. THE INTERESTS THAT HAVE ENJOYED TRADITIONAL PROTECTION ARE THE CHILD'S INTEREST IN LIFE, AND WELFARE, AND A MOTHER'S INTEREST IN PROTECTING BOTH THE LIFE OF HER CHILD AND HER RELATIONSHIP WITH HER CHILD. THE LAW AND TRADITIONS OF NEW JERSEY AND THIS NATION HAVE NEVER RECOGNIZED AS PROTECTIBLE A MOTHER'S "INTEREST" TO TERMINATE THE LIFE OF HER CHILD--AN "INTEREST" COMPLETELY OPPOSED TO THE BASIC FABRIC OF ALL LAW PROTECTING MOTHERS AND THEIR CHILDREN, AND THE VERY FUNCTION OF GOVERNMENT ITSELF. . . 3

1. The Sources of Protected Interests Under the Due Process Clause and the Criteria for Determining Which Interests Enjoy Protection Within the Scope of "Liberty." 4

(a) The Sources of Due Process Generally. 4

(b) Determining "Protectible Liberty Interests" - the Positive and Negative Criteria. 6

2. The Traditional Protections of the Child and a Mother's Relationship with Her Child. 9

(a) The Traditional Protection of the Child. 9

(b) The Traditional Protection of a Mother's Relationship with Her Child. 13

3. An "Interest" of a Mother to Terminate Her Child's Life is Unprotectible. 15

CONCLUSION 20

TABLE OF AUTHORITIES

CITATIONS:

A.L. v. P.A.,
517 A.2d 171 (A.D. 1986) 13

Arnett v. Kennedy,
416 U.S. 134 (1974) 5

Bd. of Curators, Univer. of Mo. v. Horowitz,
435 U.S. 78 (1978) 5

Berman v. Allan,
404 A.2d 8 (N.J. 1979) 12

Bishop v. Wood,
426 U.S. 341 (1976) 5

Board of Regents v. Roth,
408 U.S. 564 (1972) 4, 16

Codd v. Velger,
429 U.S. 624 (1977) 5, 16

D.Y.F.S. v. A.W.,
512 A.2d 438 (N.J. 1986) 9, 10

Delaware v. New York,
U.S. , 113 S.Ct. 1550 (1993) 5

Fantony v. Fantony,
122 A.2d 593 (1956) 9

Franz v. United States,
707 F.2d 582 (D.C. Cir. 1983) 15

Gleitman v. Cosgrove,
227 A.2d 689 (1967) 12

Graham v. Richardson,
403 U.S. 365 (1971) 5

Griswold v. Connecticut,
381 U.S. 479 (1965) 7

Hummel v. Reiss,
608 A.2d 1341 (1992) 12

Ingrahm v. Wright,
430 U.S. 651 (1977) 16

Lehr v. Robertson,
463 U.S. 248 (1983) 10

Leis v. Flynt,
439 U.S. 438 (1979) 5

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 5

Matter of Baby M,
537 A.2d 1227 (1988) 9, 13, 14

Meachum v. Fano,
427 U.S. 215 (1976) 5, 16

Meyer v. Nebraska,
252 U.S. 390 (1923) 6, 7

Michael H. v. Gerald D.,
491 U.S. 110 (1989) 6, 7, 8, 10

Moore v. East Cleveland,
431 U.S. 494 (1977) 7

Morrisey v. Brewer,
408 U.S. 471 (1972) 6, 16

New Jersey v. Colmer,
122 A.2d 325 (A.D. 1957) 15

New Jersey v. Novak,
121 A.2d 521 (1956) 15

New Jersey v. Siciliano,
117 A.2d 490 (1956) 15

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 6

Planned Parenthood of S.E. Pa. v. Casey,
112 S.Ct. 2791 (1992) 17

Quillion v. Walcott,
434 U.S. 246 (1978) 10

Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson,
201 A.2d 537 (1964) 10

Rochin v. California,
342 U.S. 165 (1958) 9, 18

Runyon v. McCary,
427 U.S. 160 (1976) 18

Rowan v. U.S. Post Office Department,
397 U.S. 728 (1970) 18

Ruckleshaus v. Monsanto Co.,
467 U.S. 986 (1984) 16

Santosky v. Kraemer,
455 U.S. 745 (1982) 10

Sees v. Baber,
377 A.2d 628 (1977) 9, 13

Smith v. Brennan,
157 A.2d 497 (1960) 11

Smith v. Organ of Fos. Fam.,
431 U.S. 846 (1977) 9, 16, 17

Smith v. Organ. of Foster Fam.,
431 U.S. 816, 838-847 and 858-863 (1977) 16

Snyder v. Massachusetts,
291 U.S. 97 (1934) 6

Stanley v. Illinois,
405 U.S. 645 (1972) 10

Wayte v. United States,
470 U.S. 598 (1985) 3

Webb's Fab. Phar., Inc. v. Beckwith,
449 U.S. 155 (1980) 16

Yick Wo v. Hopkins,
118 U.S. 356 (1885) 19

Zacchini v. Scripps-Howard Broadcasting Co.,
433 U.S. 562 (1977) . . . . . .

STATUTES:

N.J.S.A. 2A:87-1 15

CONSTITUTIONAL PROVISIONS:

Due Process and Equal Proteciton Clause, Fourteenth Amendment, U.S. Const. . . . . passim

N.J. Const., (1947) Art. I, Sec. I 11

OTHER AUTHORITIES:

Adoption Factbook, United States Data, Issues, Regulations and Resources, National Committee for Adoption, Wash. D.C., 1989, p. 20 14

CWLA Standards for Adoption Services, Sec. 2, 20 14

ARGUMENT

I. THE NEW JERSEY COURTS, IN THIS CASE, RULED THAT THE PETITIONERS' ARRESTS AND CONVICTIONS WERE REQUIRED IN ORDER TO PRESERVE THE CONSTITUTIONALLY PROTECTED INTEREST OF A WOMAN IN AN ABORTION. WHETHER SUCH AN INTEREST IS PROTECTED UNDER THE FOURTEENTH AMENDMENT, THEREFORE, IS PERTINENT TO THE PETITIONER'S CONTENTIONS THAT THESE PROSECUTIONS ARE AN UNCONSTITUTIONAL APPLICATION OF THE CRIMINAL STATUTE.

A. INTRODUCTION

The state, in its response, claims that, among other things, the questions of whether the mother in this case actually possessed an interest in terminating her child's life is "irrelevant" to the constitutionality of petitioners convictions.[1] The state's claim is wrong. The Appellate Division's opinion affirming the convictions rests upon two distinctly separate but material legal conclusions. First, the court rejected petitioners' argument that New Jersey was required to acquit the petitioners based upon the Fourteenth Amendment because the United States Supreme Court has not yet

[1] These petitioners adopt the legal argument found in the reply brief of petitioner, Loce. This brief filed on behalf of the Krail petitioners addresses more particularly the protectibility of the interest New Jersey sought to protect in this case.

expressly recognized that the child has constitutional rights [1-87-A-88]. Second, the court held that it was not free to acquit the petitioners on federal [or State] grounds because it *was required to convict* petitioners because the United States Supreme Court has previously held that a woman has a "right to an abortion". The Appellate Division stated:

> the purported rights asserted by defendants, independently and on behalf of the fetus are unsupported by case law, whereas the mother's rights, which they claim are outweighted, are firmly established. *The simple and overriding fact is that each defendant committed [an]...offense in an attempt to prevent a legal and constitutionally protected abortion. [A-87-A-88; emphasis added].*

The Appellate Division found that the *overriding fact* was petitioners attempt to prevent what the court believed as a "constitutionally protected abortion." Whether the mother had a "protectable" interest in taking the life of her child is a question necessary to determine if the Court's "overriding" consideration was a valid exercise of its police power.

Thus the State's asserted purpose and interest in petitioners' convictions rests first upon the conclusion that a mother has an interest in terminating her child's life protected by the Due Process Clause. An application of a facially valid statute is unconstitutional

if the state's interest is not sufficiently important when weighed against the deprivation of the rights of the petitioner and the child. See, *Wayte v. United States*, 470 U.S. 598, 611 (1985). This court has never determined what effect the fact that the child is a complete, separate, unique human being would have upon that determination. Clearly the child's humanity and the mother's real interests protected by the Fourteenth Amendment directly bear upon the constitutionality of petitioners' convictions.

B. THE INTERESTS THAT HAVE ENJOYED TRADITIONAL PROTECTION ARE THE CHILD'S INTEREST IN LIFE, AND WELFARE, AND A MOTHER'S INTEREST IN PROTECTING BOTH THE LIFE OF HER CHILD AND HER RELATIONSHIP WITH HER CHILD. THE LAW AND TRADITIONS OF NEW JERSEY AND THIS NATION HAVE NEVER RECOGNIZED AS PROTECTIBLE A MOTHER'S "INTEREST" TO TERMINATE THE LIFE OF HER CHILD--AN "INTEREST" COMPLETELY OPPOSED TO THE BASIC FABRIC OF ALL LAW PROTECTING MOTHERS AND THEIR CHILDREN, AND THE VERY FUNCTION OF GOVERNMENT ITSELF.

Once the fact of the child's existence is recognized, a perceived "interest" one may assert to terminate the life of a child, at any age of development, cannot be - based upon principles of constitutional interpretation - an interest protectible under the due process clause of the Fourteenth Amendment because: [1] all established law and

tradition protects the child, and a mother's relationship with her child; [2] taking the life of the child is completely opposed to the fundamental policies and purposes of these traditional protections - protections that form the core of all civilazed society; and [3] a destruction of the protections of the actual life of a child and a mother's relationship with her child is a violation of the basic purposes for which government was established.

1. The Sources of Protected Interests Under the Due Process Clause and the Criteria for Determining Which Interests Enjoy Protection Within the Scope of "Liberty."

(a) The Sources of Due Process Generally.

Each of the three great interests protected by the Due Process Clause - life, liberty and property (more precisely described as "bundles of interests") - have separate and distinct sources. The interests in life protectable under the clause are those derived from the natural and inalienable right to life, not a grant of government, but possessed by every human being, independent of any qualification other than the existence of the individual member of the human race, the object of its protection. [see Loce Pet., Pt. II]. The property interests protectible under the clause are basically those created by common law and state law. *Board of Regents v. Roth,*

408 U.S. 564, 577 (1972).

> Property interests, of course, are not created by the constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlements to those benefits. *Bd. of Regents,* 408 U.S. at 577.

This understanding was recently cited with approval. *Delaware v. New York*, __ U.S. __, 113 S.Ct. 1550, 1557; see also, and compare *Meachum v. Fano,* 427 U.S. 215, 224-227 (1976); *Leis v. Flynt*, 439 U.S. 438 (1979); *Codd v. Velger,* 429 U.S. 624, 628 (1977); *Bishop v. Wood,* 426 U.S. 341 (1976); *Arnett v. Kennedy,* 416 U.S. 134 (1974); *Bd. of Curators, Univer. of Mo. v. Horowitz,* 435 U.S. 78 (1978); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

The source of the liberty interests protected by the Due Process Clause has been the subject of many of this Court's decisions, and although it has caused significant debate among its sitting jurists, the principles of law which apply to this case are clear and well established.

Graham v. Richardson, 403 U.S. 365 (1971) declared:

> This court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a 'privilege'. Id, at 374.

Now the Court must first examine the precise nature of the

asserted "interest" at stake. *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972). Second, whether the "interest", its "nature" having been determined, is one protected by the due process clause requires the application of a number of principles.

It is axiomatic that the term "liberty" in the Due Process Clause extends beyond mere freedom from physical restraint. *Board of Regents v. Roth*, 408 U.S. at 272; *Meyer v. Nebraska*, 252 U.S. 390, 399 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Michael H. vs. Gerald D.*, 491 U.S. 110, 121-122 (1989) [Scalia, J., plurality opinion] (see also Brennan, J., Dissenting, 491 U.S. at 137). Reaching beyond simply listing examples of "interests" protected, the case law provides both positive and negative criteria used to determine which "liberty interests" are protected by the due process clause.

(b) Determining "Protectible Liberty Interests" - the Positive and Negative Criteria.

It has been repeatedly stated by this Court that the Due Process Clause protects interests (or liberties) so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). It has also been said that

pronouncements of this court which identify those interests protected by the clause:

> Reflect 'continued insistence upon respect for the teaching of history [and] solid recogniations of the basic values that underline or socity...' *Michael H. v. Gerald D.*, 491 U.S. 110, 122-123; Scalia, J., writing for the plurality [Rehnquist, C.J., O'Connor, J., and Kennedy, J., joining] quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment).

Employing these positive criteria - "tradition and history," "the conscience of our people," and "recognition of the basic values that underlie socity," the court has recognized as interests protected by Due Process those fundamental to a strong family life, such as a "right to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those principles long recognized...as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*,262, U.S. at 399.

There has been significant, even contentious debate over the precise definition of the "deeply rooted traditions" from which interests derive their protection. Some members of the court argue for a broader definition and some seek a narrower one. See *Moore v. East Cleveland*, 431 U.S. 494,502 (1977); see and compare the

plurality opinion of Justice Scalia, *Michael H. v. Gerald D.*, 491 U.S. 110, with the dissents of Justice Brennan, 491 U.S. at 136, and Justice White, 491 U.S. at 157.

Regardless of whether the Court employed a broad or narrow definition of the history and traditions criteria, in the present case there is no doubt that a child's life is protected by Due Process, a mother's relationship with her child is protected as a liberty interest, and an "interest" in taking the life of a child by a mother could never be recognized as a protected liberty interest. All of the positive criteria, - history and tradition; the fundamental function of government, the dictates of the natural and inalienable rights of both mother and child; and the conscience and basic values that underlie society - all require protection of a mother's relationship with her child, her other interests (see IIc of Krail Pet.) and protection of the child's life (See Pt. II of Loce Pet.). None support the asserted "interest" of a mother to kill her own child at any age of development. Conversely, no new theory could be created to include a right to terminate the life of a child in an effort to broaden concepts of liberty protections because such an interest fails the negative criteria.

First, it would destroy those interests long protected. See, e.g. Smith v. Organ. of Foster Fam., 431 U.S. 816, 838-847 (1977). Second, it would be offensive to our sense of justice. See, e.g. *Rochin v. California*, 342, U.S. 165, 169-173 (1958).

2. The Traditional Protections of the Child and a Mother's Relationship with Her Child.

(a) The Traditional Protection of the Child.

One of the greatest and most important functions served by the state is the protection it has traditionally provided the children within its borders. In its exercise of its *parens patriae* jurisdiction, New Jersey has traditionally protected the family unit, and its continued maintenance to advance the welfare of children. *D.Y.F.S. v. A.W.*, 512 A.2d 438 (1986); *Sees v. Baber*, 377 A.2d 628 (1977); *Matter of Baby M*, 537 A2d 1227 (1988). When, however, a family separates, the overriding interest is the welfare of the child, so that a custody dispute is resolved based upon the child's best interests. *Fantony v. Fantony*, 122 A.2d 593 (1956).[2] Even when the fundamental constitutional right of a parent to the companionship of

[2] The best *interests of the child* standard has been traditionally employed in all fifty states. See, Atkinson, J., *Modern Child Custody Practice*, Kluwer Law Book Publishers, Inc., New York, New York, 1986, Chap. 4, p. 217-315; See also appendices following Chap. 4.

her child is threatened by termination of all parental rights, the ultimate question is harm to a child, so if there is likely harm of a certain magnitude those rights will be terminated. *D.Y.F.S. v. A.W.*, 512 A.2d 438 (N.J. 1986).

This focus upon the welfare of a child, even when the traditionally protectible rights of parents are terminated, is consistent with the opinions of this Court which have scrutinized state terminations of parental rights protected by the Fourteenth Amendment. *Santosky v. Kraemer*, 455 U.S. 745 (1982); See, and compare, *Lehr v. Robertson*, 463 U.S. 248 (1983); *Quillion v. Walcott*, 434 U.S. 246 (1978); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Stanley v. Illinois*, 405 U.S. 645 (1972). An alleged "interest" of a parent to harm, or an "interest" which is harmful to, a child, is simply not part of the protected parental rights under the Due Process Clause of the Fourteenth Amendment.

Traditionally, New Jersey protects children even during pregnancy, under its *parens patriae* jurisdiction, against a parents' conduct which threatens the child's life. *Raleigh Fitkin-Paul Morgan*

Memorial Hospital v. Anderson, 201 A.2d 537 (1964).[3]

Indeed, New Jersey traditionally recognized that a child's life begins at conception and the child enjoys the right to live, prior to birth, under the state constitution. The child's actual existence from conception was recognized in *Smith v. Brennan,* at 157 A.2d 497, 501-503 (1960):

> ...a child is in existence from the moment of conception and not merely a part of its mother's body. 31 N.J. at 362. It is clear...that before birth an infant is a distinct [human being] and that the law of the land recognizes that rights which he will enjoy when born can be violated before his birth. 31 N.J. at 364.

In *Raleigh Fitkin, supra,* New Jersey found that the child's rights were personal to the child, and, as a separate human being, the court appointed a guardian ad litem. 201 A.2d at 538. This holding reflects the child's constitutional right to life under Art. I, Sec. I of the state constitution:

> The right to life is inalienable in our society...we are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of a single human life is the decisive factor ... it may have been easier for the mother and less

[3] The history and tradition of this nation has always included the protection of the child even during pregnancy in many contexts limited only by the scientific understanding available. See authorities from states cited in appendix C at A-31 to A-57 bound with Loce Pet.; see also the various circumstances in which the British Common Law protected the child and the child's interest at the earliest age at which science could establish the child's actual existence. App D at A-58 to A-71.

> expensive for the father to terminate the life of the child while he was an embryo, but these alleged detriments cannot stand against the preciousness of a single human life... . *Gleitman v. Cosgrove*, 227 A.2d 689, 693-694 (1967).

Even after *Roe* was decided, the New Jersey Supreme Court reaffirmed the child's constitutional right to live prior to birth under the state constitution and the state's policy of protecting life:

> One of the most deeply held beliefs of our society is that life ... is more precious than nonlife [citation omitted] ... concrete manifestations of this belief are not difficult to discover. Documents which set forth principles upon which our society are founded are replete with references to the *sanctity of life*. The Federal Constitution characterizes life as one of the three fundamental rights of which no one can be deprived without due process of law ... our own constitution proclaims that the 'enjoyment and defending of life' is a natural right. N.J. Const. (1947), Art. 1., Sec. 1. The declaration of independence states that the primacy of man's *'inalienable' right to life is a 'self-evident truth.'* Nowhere in these documents is there to be found an indication that the life of persons suffering from handicaps are to be less cherished than those of non-handicapped beings. *Berman v. Allan*, 404 A.2d 8, 13 (N.J. 1979) [emphases added].

As recently as 1992, the New Jersey Supreme Court reaffirmed that portion of *Gleitman*, *supra*, which held that the state constitution extends a right to live to children prior to birth:

> In *Gleitman* the Court observed that '[a] child need not be perfect to have a worthwhile life,' [citation omitted] and found that, '[e]ugenic considerations are not controlling,' *ibid.*, noting that considerations of financial burden to the father and convenience of the mother *did not outweigh the child's right to live, albeit imperfectly. Hummel v. Reiss*, 608 A.2d 1341, 1345-1346 (N.J.

1992) [emphasis added].

(b) The Traditional Protection of a Mother's Relationship with Her Child.

New Jersey has a strong and long-standing policy to protect a mother's relationship with her child during pregnancy,[4] which protects against the destruction of the mother's relationship with her child and the exploitation of the mother during pregnancy. The fundamental policy of New Jersey's adoption laws is to preserve the relationship of a mother and child during and after pregnancy and protect it against exploitation and undue influences. *Sees v. Baber*, 377 A.2d 628 (1977); *Matter of Baby M*, 537 A.2d at 1248-1250; *A.L. v. P.A.*, 517 A.2d 171 (A.D. 1986). Likewise, New Jersey protects a mother's relationship with her child from exploitation, pressures and inducements of surrogate contracting arrangements even when she had promised to conceive and carry a child for another couple, and terminate her relationship after birth. *Matter of Baby M* at 1248-1250. This protection is based upon the

[4] The deep-rooted respect for this relationship is found in western literature replete with statements that recognize that this relationship is at the heart of an ordered culture. It is "the nearest and dearest" known to mankind. Aeschylus, "Eumonides" translated by George Thompson, Greek Play's in Modern Translation (Dudley, Fitts, ed. 1947) at 130.

long-standing policies which protected the mother's relationship even after her promises, made before or during pregnancy, to surrender her relationship, whether it be to adoption or under the terms of a surrogacy arrrangement. New Jersey refuses to enforce such a promise because a decision by a mother to terminate her relationship with her child, made during pregnancy, regardless of counseling, is uninformed as a matter of law. *Matter of Baby M* at 1248.[5]

When parents are separated at a child's birth, and they disagree on custody, New Jersey's strong commitment to preservation of the mother's relationship requires that the child initially be left in the custody of the mother (if she desires it) unless there is a clear showing that the child will be harmed because the mother is unfit. *Matter of Baby M* at 1261. This policy is based on the recognition that the interests of a mother and child, at every stage of the child's development, is the most cherished and best protected in all of

[5] The standards in adoption services promulgated by the Child Welfare League of America forbids enforcement of a mother's surrender of her parental rights made before birth. See, CWLA Standard for Adoption services, sec.2.20. All states refuse to recognize the validity of a mother's decision to surrender until after her child is born, and in most instances she has a right to revoke a consent given after birth. See, *Adoption Factbook, United States Data, Issues, Regulations and Resources*, National Committee for Adoption, Wash. D.C., 1989, p. 20; See also chart, p. 22-33.

human experience. The New Jersey laws against abortion were designed to protect the mother's interests as well as those of the child. *See, New Jersey v. Novak*, 121 A.2d 521 (1956); *New Jersey v. Siciliano, 117 A.2d 490 (1956);* New Jersey v. Colmer, *122 A.2d 325 (A.D. 1957); N.J.S.A. 2A:87-1.*

The relationship and the benefits a mother derives from it are too important, too sacred to destroy it at all, by inducement or threat, or in the circumstance where it is impossible for her to truly appreciate the nature of her act. Any method of termination of a mother's relationship with her child before birth is contrary to all existing law and policy in New Jersey.[6]

3. An "Interest" of a Mother to Terminate Her Child's Life is Unprotectible.

An "interest" of a mother to terminate the actual life of her child has no source in law or the traditions of this nation. It cannot be

[6] In *Franz v. United States*, 707 F.2d 582 (D.C. Cir. 1983), the interest of a mother in her child's relationship was eloquently described:

> [the law protects] the profound importance of the bond between a parent and child to the emotional life of each. *Frequently each party to the relationship depends heavily on his ties with the other for his sense of self-worth, for his very self-definition.* To rephrase the point in the language of entitlement, the parent's right to the preservation of his relationship with his child *derives from the fact that the parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his offspring. Id.* at 599 [emphases added].

listed as a "liberty" interest protected by the Due Process Clause because it meets none of the positive criteria; it is not rooted in "traditions of history"; protection of such an interest is not rooted in "the conscience of our people"; its protection would not constitute the recognition of basic values that underlie our society." *See, Board of Regents v. Roth,* 408 U.S. 564, 577 (1972); *Morrisey v. Brewer,* 408 U.S. 471, 481-483 (1972); *Smith v. Organ. of Foster Fam.*,431 U.S. 816, 838-847 and 858-863 (1977); *compare* plurality opinion, Brennan, J., 491 U.S. at 137; *c.f., Meachum v. Fano,* 427 U.S. 215, 224-227 (1976); *Ruckleshaus v. Monsanto Co.,* 467 U.S. 986, 1001-1003 (1984); *Codd v. Velger,* 429 U.S. 624, 628 (1977); *Ingrahm v. Wright,* 430 U.S. 651, 672-673 (1977); *Webb's Fab. Phar., Inc. v. Beckwith,* 449 U.S. 155, 161 (1980).

The "interest" of a mother in terminating her child's life is not merely without a legitimate source, it is directly opposed to all of the interests of a mother and child which have always enjoyed protection. The repugnat nature of this "interest" precludes it as "protectible" because, by necessity, it destroys the natural right of the child and the fundamental rights of the mother in their

relationship. *Smith v. Organ, of Fos. Fam.*, 431 U.S. 846. In *Smith*, the majority observed that for one to have a recognized liberty interest, it cannot operate to "derogat[e]" the substantive due process rights of another. 431 U.S. at 846. (See also, concurring opinion of Justice Stewart, 431 U.S. at 856-863.) It derogate's a mother's own traditionally protected interest.[7] If it is inherently bad for her best interests it cannot rise to the level of a protected interest.

The constitution, and the society of individuals whose collective interests it serves to protect, must protect the relationship of a mother and her child. Simply because an individual, in a time of crisis, asserts an alleged "interest" -- one repugnant to those traditionally protected -- does not, and cannot give rise to an obligation on the part of that society, particularly by operation of that constitution, to assist, accomodate or protect the act of destroying the life of a child and the cherished relationship a mother has with her child -- the very objects of the most fundamental and necessary protections in all of civilized society. The constitution,

[7] Nothing in *Casey*, (e.g., at 112 S.Ct. 2804-2807) is contrary to these observations. *Casey* did not address the humanity of the child and therefore did not analysis the nature of the "interest" to terminate the life of an actual child.

and the people for whom it exists, can only protect one set of these interests: either it protects the lives of those within its jurisdiction, or it protects the taking of those lives; either it protects a mother's relationship with her child, or it protects an interest in destroying it.

Likewise, for an interest to be protectable under the Due Process Clause it must be just. Protection of the interest must not offend our sense of justice. *Rochin v. California*, 342 U.S. 165, 169-173 (1958). If protection of the deliberate termination of a child's life, does not offend our sense of justice, then we are not the nation we intended to be. Deliberately killing a child at any age is, by its nature, unjust.

Neither *Roe* nor *Casey*, although protecting an "interest" in abortion, recognized an interest in actually killing a child.[8] A government which expressly authorizes or participates in the termination of a child's life has failed to perform the legitimate function for which it was created. The purpose and duty of the

[8] Even if such an interest were "protectible" (which it cannot be), it could never outweigh the child's right to live. See and compare, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Rowan v. U.S. Post Office Department*, 397 U.S. 728 (1970); *Runyon v. McCary*, 427 U.S. 160 (1976).

government is to protect its people and the lives of all within its jurisdiction. *Yick Wo v. Hopkins*, 118 U.S. 356, 369-370 (1885).

The right and duty to preserve life cannot co-exist with a right or duty to destroy it. The right and duty to preserve and protect the cherished relationship between mother and child cannot co-exist with a right and duty to destroy it. It is the law, as it represents the collective interests of the individuals for whom it exists, that must choose which set of interests it must protect, and long ago our law was required to choose life over death; the mother's beautiful interest in her child's life over its destruction; the protection of innocent children over the misguided philosophies and trends in social thought which come and go. If there are any self-evident and universal truths that can act for the human race as a guide or light in which social and human justice can be grounded, they are these: that life has intrinsic value; that each individual human being is unique and irreplaceable; that the cherished role of a mother in her relationship with her child has, at every moment of life, intrinsic worth and beauty; that the intrinsic beauty of womanhood is inseparable from the beauty of motherhood; and that this

relationship, its unselfish nature and its role in the survival of the race, is the touchstone and core of all civilized society. Its denigration is the denigration of the human race. This relationship, its beauty, its survival, its benefits to the mother and child, its benefits to society, all rest in the self-evident truth that a mother is not the owner of her child's life -- she is the trustee of it.

CONCLUSION

Since the purpose of the state's action in removing, arresting and convicting the petitioners was to accomodate the "right" of Ms. Z. to terminate her child's life, the constitutionality of the convictions in this case rests upon New Jersey's conclusion that, even if the child was a complete, separate and unique human being, the child's mother had an interest in killing the child which was protected by the Fourteenth Amendment. This Court has never ruled that a mother has such an interest protected by the liberty clause of the Fourteenth Amendment.

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